IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 412 of 2004

For Approval and Signature:

HONOURABLE MR.JUSTICE BANKIM.N.MEHTA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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KANTIBHAI KHUSHALBHAI VASAVA & 2 - Appellant(s)

Versus

STATE OF GUJARAT & 1 - Opponent(s)

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Appearance :

MR HM PARIKH for Appellant(s) : 1 - 3.
MR SS PATEL, A.P.P. for Opponent(s) : 1,
NOTICE SERVED for Opponent(s) : 2,

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CORAM : HONOURABLE MR.JUSTICE BANKIM.N.MEHTA

Date : 24/11/2005

ORAL JUDGMENT

1. This is an appeal by the appellants filed U/S.374(2) of Code of Criminal Procedure, 1973 challenging judgment and order passed on

11.3.2004 by learned Presiding Officer, Fast Track Court, Nadiad in Sessions Case No.126 of 2001 convicting the appellants for the offence punishable under Sec.223 of Indian Penal Code and directing each of them to undergo imprisonment of one year and to pay a fine of Rs.200/- each and in default thereof to undergo simple imprisonment of two months.

2. The brief facts of the prosecution case are that the complainant Jasvantsinh Vadesinh Bariya Armed Police Constable lodged a complaint stating that he was deputed along with the appellants was on duty to take two accused viz., Ajmudin @ Ajim @ Chino Fakruddin Saiyed and Rafiq @ Rafiq Gay Ganibhai Shaikh from Baroda Central Jail to Anand Court; that the appellant No.1 i.e. Kantibhai handcuffed the accused and warrants were obtained; that one of the warrants was bearing endorsement made with red ink by P.S.I. indicating that accused mentioned therein was an

absconder; that the accused were tied with the rope and it was in the hands of appellant no.1 i.e. Kantibhai; that thereafter, the appellants with other officers started for Anand and when they reached Anand Court, appellant no.2 i.e. Manilal was sent to bring snacks who brought 'Bhajiya'; that except him, the prisoners and other police officers ate the snacks and appellant no.1 i.e. Kantibhai consumed half cup of tea, whereas the other appellant consumed a cup of tea; that after about 15 minutes of taking snacks, the appellants became unconscious; that at that time, one of the accused removed the handcuff and started running; that therefore, he (complainant) ran after him but the accused tried to cross the wall by jumping it over and in that attempt, he fell down and therefore, he and other police officers – Vakhatsinh reached near him and caught him; that the other prisoners ran away with the handcuff; that the appellants were sitting on the bench in unconscious state of

health and that the appellants had committed offence punishable U/S.223 of Indian Penal Code.

3. On the basis of the complaint, investigation started. At the end of investigation, charge-sheet was filed in the Court of learned Judicial Magistrate, First Class, Anand against the appellants and other escaped prisoners for the offence punishable under Sec. 223, 224 and 328 of Indian Penal Code. The case was committed to the Court of Sessions for trial. Learned Fast Track Judge framed charge at Exh.5 against the appellants who pleaded not guilty to the charge and demanded trial. Pursuant to that the prosecution adduced oral as well as documentary evidence. At the end of trial incriminating circumstances were explained to the appellants and their further statements were recorded wherein the accused denied having committed any offence. After hearing the learned Additional Public Prosecutor and learned advocate for the

accused, the learned Presiding Officer found the appellants guilty of having committed offence under Sec.223 of Indian Penal Code and directed to undergo aforesaid sentence of imprisonment giving rise to this appeal.

4. Learned advocate Mr. Parikh appearing for the appellants submitted that the appellants have allegedly committed the offence while they were on duty, therefore, the prosecution is required to obtain sanction for prosecution, but, no such sanction is accorded for the prosecution of police officer who were public servant and therefore, the appellants should be acquitted. He has also submitted that the medical evidence and the expert's opinion do not support the prosecution case and therefore, even otherwise, the appellants cannot be convicted for the offence punishable under Sec.223 of Indian Penal Code. He has relied upon the decisions rendered in the case of (i) ***Lilabhai Khodabhai Bharwad***

V/s. State of Gujarat and Others reported in ***1992 (1) G.L.H. 308***, (ii) ***Bhikhaji Vagaji Vs/. L.K. Barot & Ors.*** reported in ***22 G.L.R. 956***, (iii) ***Aher Pola Parbat Barad V/s. Chituri Sahib, Asstt. S.P., Veraval & Ors.*** reported in ***2001(2) G.L.H. 222***, (iv) ***Rizvan Ahemad Javed Shaikh and Others V/s. Jammal Patel and Others*** reported in ***AIR 2001 SC 2198*** and (v) ***PK Roshan Vs/. State of Gujarat*** reported in ***2005(2) G.L.H. 759***.

5. The learned Additional Public Prosecutor Mr. Patel while opposing the appeal has fairly conceded that no sanction is accorded for the prosecution of the appellants but asserted that there is no requirement of law that sanction should be obtained for the prosecution of the appellants.

6. In view of the contentions raised by the learned advocate for the appellants, it is clear that the appellants have challenged the judgment

and order of conviction on two grounds; viz., (i) want of sanction and (ii) absence of evidence.

7. There is no dispute that the appellants were police officers deployed to escort two persons from Baroda Central Jail to Anand Court. In view of this, the Court is not required to give finding about the status of the appellants. Sec.197(3) of Code of Criminal Procedure, 1973, provides that ***"no Court shall take cognizance of an offence except with the previous sanction of the Government for the members of forces charged with the maintenance of the public order"***. Therefore, it is requirement of law that beofre prosecuting any police officer for the offences committed during the discharge of his official duty, sanction to prosecute should be obtained from the Government. Under Sec.2(11) of the Bombay Police Act, 1951, "Police Officer" means "***any member of the Police Force appointed under this Act, and includes a special or an***

additional Police Officer appointed under Sec.21 of 22". In view of above, it is clear that the appellants were the police officers and were the members of police force appointed under the Bombay Police Act, 1951 and were charged with the maintenance of public order and therefore, sanction was required to be obtained prior to the prosecution of the appellants. However, there is no evidence on record to indicate that such sanction was obtained before prosecuting the present appellants. Learned Additional Public Prosecutor Mr. S.S. Patel has also conceded that no such sanction was obtained and / or produced on record of the case.

8. In ***Bhikhaji Vaghaji V/s. L.K. Barot and Ors.*** reported in ***22 G.L.R. 956***, the Division Bench of this Court has held that members of police force are charged with maintenance of public order and therefore, sanction under Sec.197(2) will have to be obtained if police officers while acting or

purporting to act in discharge of official duty are sought to be prosecuted.

9. In ***Lilabhai Khodabhai Bharwad V/s. State of Gujarat and Others*** reported in ***1992(1) G.L.H. 308***, the SRP Personnel in course of duty opened fire to control the two groups attacking each other. They were prosecuted without obtaining sanction. This Court has held that sanction of the Government to prosecute, the SRP Personnel was required and no Court can take cognizance of such offence except with the previous sanction.

10. In the case of ***Aher Pola Parbat Barad V/s. Chituri Sahibm Asstt. S.P., Veraval & Ors.*** reported in ***2001(2) G.L.H. 222***, this Court has again held that the prior sanction of Government is necessary as envisaged under Sec.45 and Sec.197 of Code of Criminal Procedure, 1973 to lodge prosecution against accused who are the

police officers.

11. In ***Rizvan Ahemad Javed Shaikh and Others V/s. Jammal Patel and Others*** reported in ***AIR 2001 SC 2198***, the Hon'ble Supreme Court has held that benefit of Sec.197(2) of Code of Criminal Procedure granted under ***State Notification No.D, 2.6.1979*** is available to the police officer defined in Police Act charged with maintenance of public order.

12. In ***P.K. Roshan V/s. State of Gujarat***, reported in ***2005 (2) G.L.H. 759***, this Court has laid down the law with regard to the sanction.

13. In view of all above decisions, it is clear that sanction to prosecute, a police officer is ***sine qua none*** if the offences are allegedly committed during the course of their discharge of duty. The appellants were police officers and were assigned the duty to take the prisoners from

Baroda Central Jail to Anand Court and during the performance of their duty, the alleged offence was committed. There is no evidence to indicate that before prosecuting the appellants, who were police officers, sanction was obtained. In my view, the learned trial Judge committed error in holding that no sanction was required to be obtained, holding that the protection under Sec.197(2) and (3) is not available to the police officers below the rank of Sub Inspector.

14. In view of above, it is clear that no sanction as is required under Sec.197(3) was obtained before prosecuting the appellants and therefore, the trail Court could not have taken cognizance against them and therefore, the judgment and order of conviction is liable to be set aside.

15. As regards the merits of the case, it is the prosecution case that the appellants being police

officers were bound to keep in confinement, the other co-accused charged with offence who were lawfully committed to the custody but negligently permitted such co-convicts to escape from confinement. It is also the case of the prosecution that the co-convicts dropped some substance in tea which made them unconscious and thereafter the co-convict escaped from the custody. The prosecution has examined P.W.11 – Vinaybhai, Exh.32 who was medical officer at Anand Nagarpalika Hospital. In his evidence, he has deposed that he was sure that 'Beladona' poison was given to the appellants but a question mark was put by him in certificate Exh.34 because there are other poisons which could render a person unconscious. He has also deposed that he had taken out three samples from the stomach of the appellants and given to police. The prosecution has also produced medical certificates given by the Doctor after examining the appellants at Exh.34 to 36. There is a

question mark in the certificate Exh.34 near the word 'Beladona Poison'. In view of this document, it appears that Doctor himself was not sure about the nature of the poison.

16. The prosecution has produced F.S.L. Report at Exh.42/2 before the trial Court. It appears that the said document is not given exhibit number though under Sec.294 of Code of Criminal Procedure, the same is required to be given exhibit number. In view of the fact that the F.S.L. Report is a public document; the same can be relied upon. It is therefore ordered to be exhibited. The said F.S.L. Report and the result of the analysis show that the samples did not contain any tranquilizer, seductive or hypnotical element. In view of this report, the prosecution has failed to establish that the appellants were given some drug in tea which made them unconscious. Thus, the prosecution has failed to prove this vital fact.

17. In view of above, the prosecution has failed to prove that previous sanction was accorded before prosecuting the appellants and has also failed to prove the charge that the appellants were administered some drug which made them unconscious and the co-convicts escaped from the custody.

18. In view of this, the appeal succeeds. The judgment and order passed by the learned Presiding Officer, Fast Track Court, Nadiad in Sessions Case No. 126 of 2001 on 11.03.2004 convicting the appellants for the offence punishable under Sec.223 of Indian Penal Code and directing them to undergo one year imprisonment and to pay fine of Rs.200/- and in default thereof to undergo further rigorous imprisonment of two months is set aside. Amount of fine, if paid by the appellants, be refunded to them. The

appellants are on bail, therefore, their bail bonds stand discharged. Direct service is permitted.

[**BANKIM N. MEHTA, J.**]

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